Public Bank Bhd v Datuk Mohd Ali bin Hj Abdul Majid & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02–17 OF 2009
ZAINUN ALI, JEFFREY TAN AND ZAHARAH IBRAHIM JJCA
25 OCTOBER 2011

Civil Procedure — Appeal — Damages — Professional negligence of solicitors — Judgment in default obtained against customer — Section 218 notices issued not met but solicitors proceeded to present winding up petition — Notices held to be defective and winding up petition dismissed — Exceeded limitation period under s 6(3) of the Limitation Act 1953 — Judgment against customer could not be enforced — Redress from solicitors for professional negligence — Denial of liability and demanded of proof of loss allegations

The present appeal arose from a suit in the court below where the appellant claimed against the respondents for damages in the sum of RM899,190.13 plus RM26,202.55 plus RM13,691.70, due to damages suffered by the appellant as a result of the respondents' professional negligence. The respondents were the partners of a firm of solicitors who prosecuted the appellant's winding up petition against the latter's customer ('ODA Holdings'). The respondents obtained judgment in default for the appellant against ODA Holdings in the sum of RM899,190.13 and issued s 218 notices ('the notices') on the latter, demanding payment of the judgment sum. The notices were not met and the respondents proceeded to present a winding up petition against ODA Holdings. However, the winding up court held that the notices were defective and subsequently dismissed the winding up petition with costs of RM26,202.55, after taxation. By then, when the winding up petition was dismissed, it had exceeded the limitation period prescribed by s 6(3) of the Limitation Act 1953 and judgment against ODA Holdings could not be enforced. The appellant then claimed redress from the respondents for their professional negligence. The respondents denied liability and demanded proof of the appellant's loss allegations. The respondents further argued that the claim was founded on negligence and therefore, the claim was for unliquidated damages which ought to be assessed. In the court below, the learned judge did not perceive the claim as one for unliquidated damages and also held that the claim was not fully particularised in the affidavit in support of the application for summary judgment.

Held, allowing the appeal with costs, setting aside the order of damages assessment and affirming the summary judgment:

(1) The court could not agree with the learned judge's decision that the claim

was not fully particularised, as the learned judge was able, to the contrary, to reproduce the particulars of the claim for RM899,190.13 in his grounds of judgment from the particulars stated by the appellant, which particulars were clearly more than sufficient particulars of the claim for the said RM899,190.13 (see para 6).

(2) The learned judge erred in his decision that there was no evidence that the legal costs and/or professional fees in relation to the claim of RM26,202.55 which the appellant paid to ODA Holdings as legal costs and for the refund of RM13,691.70 that the appellant paid to the respondents as professional fees, had been paid for. Contrary to the finding of the learned judge, the appellant had clearly affirmed that legal costs were paid to ODA Holdings and that professional fees were paid to the respondents (see para 7).

(3) All reasons of the learned judge to order assessment of damages could not be sustained. The quantum of loss of the appellant was known and proved, by the judgment against ODA Holdings, by the quantum stated in the notices and by the unchallenged averments in the affidavit in support. There was no case for damages to be assessed (see para 8).

[Bahasa Malaysia summary

Rayuan ini timbul daripada satu guaman di mahkamah seperti dinyatakan di bawah yang mana perayu mendakwa terhadap responden-responden untuk ganti rugi berjumlah RM899,190.13 termasuk RM26,202.55 dan RM13,691.70, atas kerosakan yang dialami oleh perayu disebabkan kecuaian profesional responden-responden. Responden-responden merupakan rakan kongsi-rakan kongsi firma peguambela yang mengeluarkan petisyen penggulungan perayu terhadap klien perayu ('ODA Holdings'). Responden-responden mendapatkan penghakiman ingkar bagi perayu terhadap ODA Holdings berjumlah RM899,190.13 dan mengeluarkan notis s 218 ('notis-notis') kepada ODA Holdings, menuntut bayaran untuk jumlah penghakiman. Notis-notis tersebut tidak dilayan dan responden-responden meneruskan untuk mengemukakan petisyen penggulungan terhadap ODA Holdings. Walau bagaimanapun, mahkamah penggulungan memutuskan bahawa notis-notis tersebut adalah tidak teratur dan kemudiannya mengetepikan petisyen penggulungan dengan kos RM26,202.55, selepas cukai. Pada masa itu, apabila petisyen penggulungan diketepikan, ia telah melebihi had masa yang ditetapkan oleh s 6(3) Akta Had Masa 1953 dan penghakiman terhadap ODA Holdings tidak boleh dikuatkuasakan. Perayu kemudiannya menuntut pembelaan daripada responden-responden untuk kecuaian profesional mereka. Responden-responden menafikan liabiliti dan menuntut bukti dakwaan-dakwaan kerugian perayu. Responden-responden seterusnya menghujah bahawa tuntutan tersebut diasaskan pada kecuaian dan oleh itu, tuntutan adalah untuk ganti rugi jumlah tak tentu yang seharusnya dinilai. Dalam mahkamah terdahulu, hakim yang bijaksana tidak menganggap

tuntutan tersebut sebagai tuntutan untuk ganti rugi jumlah tak tentu dan juga memutuskan bahawa tuntutan tersebut tidak diperincikan sepenuhnya dalam afidavit sokongan untuk permohonan penghakiman terus.

Diputuskan, membenarkan rayuan dengan kos, mengetepikan rayuan dengan kos, mengetepikan perintah untuk penilaian ganti rugi dan mengesahkan penghakiman terus:

(1) Mahkamah tidak bersetuju dengan keputusan hakim bijaksana bahawa tuntutan tersebut tidak diperincikan, memandangkan hakim yang bijaksana sebaliknya, dapat mengeluarkan semula butiran-butiran tuntutan untuk RM899,190.13 dalam alasan-alasan penghakiman beliau daripada butiran-butiran yang dinyatakan oleh perayu, yang mana butiran-butiran tersebut adalah jelas melebihi butiran-butiran tuntutan mencukupi untuk RM899,190.13 (lihat perenggan 6).

(2) Hakim yang bijaksana terkhilaf dalam keputusannya bahawa tiada keterangan bahawa kos undang-undang dan/atau yuran profesional berkenaan tuntutan RM26,202.55 di mana perayu telah membayar kepada ODA Holdings sebagai kos undang-undang dan untuk pemulangan semula RM13,691.70 yang dibayar perayu kepada responden-responden sebagai yuran profesional, telah dibayar. Bercanggahan dengan dapatan hakim yang bijaksana, perayu dengan jelas mengesahkan bahawa kos undang-undang telah dibayar kepada ODA Holdings dan yuran profesional dibayar kepada responden-responden (lihat perenggan 7).

(3) Kesemua alasan hakim yang bijaksana untuk mengarahkan penilaian gantirugi tidak boleh dikekalkan. Kuantum ganti rugi perayu telah diketahui dan dibuktikan oleh penghakiman terhadap ODA Holdings melalui kuantum yang dinyatakan di dalam notis-notis dan hujahan-hujahan tidak dicabar di dalam afidavit sokongan. Tiada kes untuk ganti rugi dinilai (lihat perenggan 8).]

Notes

For cases on damages, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 990–998.

Cases referred to

Adzmi bin Ali & Anor v Mohamed Isa bin Kasad [1987] 2 MLJ 199, SC (distd)

Ahearn, Re; Ex parte Palmer (1906) 6 SR (NSW) 576 (refd)

Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd [1974] 2 MLJ 94, FC (refd)

Gissco Sdn Bhd v Blackgold (M) Sdn Bhd [1988] 2 MLJ 397 (refd)

Mohanlal v Rameshwar Dayal And Ors AIR 1976 Raj 4, HC (refd)

Legislation referred to

Companies Act 1965 s 218
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 14 r 4(1)

Hasmaliza Othman (Iza Ng Yeoh & Kit) for the appellant.
CK Yeoh (Jamie Wong with him) (Ranjit Singh & Yeoh) for the respondent.

Jeffrey Tan JCA (delivering judgment of the court):

[1] In the court below, the appellant's claim against the respondents was for damages in the sum of RM899,190.13 plus RM26,202.55 plus RM13,691.70 (see p 86 of the appeal record), it being the alleged damages suffered by the appellant on account of the negligence of the respondents, who were the partners of a firm of solicitors known as Tetuan Mohd Ali & Co, to competently prosecute its winding up petition against its customer, one ODA Holdings (M) Development Corporation Sdn Bhd. In short, the claim was founded on the professional negligence of the respondents.

[2] In relation to that claim, the appellant applied for and was granted summary judgment by the learned senior assistant registrar. However, on appeal by the respondents to judge-in-chambers, the learned judge ordered damages to be assessed. Against that order of assessment by the learned judge, the appellant bank appealed.

[3] There was no dispute that the respondents were engaged as solicitors by the appellant to commence legal proceedings against ODA Holdings to recover the credit that the appellant had extended to ODA Holdings. On 10 April 1987, the respondents obtained judgment (in default) for the appellant against ODA Holdings in the sum of RM899,190.13. On 17 March 1998, the respondents issued s 218 notices on ODA Holdings, demanding payment of the judgment sum. When those notices were not met, the respondents presented, on 2 September 1998, a winding up petition against ODA Holdings. However, it was held on 22 June 1999 by the winding up court that those s 218 notices were defective. The winding up petition was accordingly dismissed with costs, which came to, after taxation, to RM26,202.55. By then, when the winding up petition was dismissed, it was beyond the time permitted (see s 6(3) of the Limitation Act 1953) to enforce the judgment dated 10 April 1987. In that sorry state, the appellant then claimed redress from the respondents, for their professional negligence in the conduct of that winding up petition.

[4] In the court below, in resisting the application for summary judgment, the respondents did not file any affidavit in reply, a point that was observed by

the learned judge (see 131AR). Order 14 r 4(1) of the Rules of the High Court 1980 provided that 'A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court'. In *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd* [1974] 2 MLJ 94, where in resisting the application for summary judgment the defendants did not file an affidavit in reply, the former Supreme Court per Gill CJ (Malaya) conveyed that the defendants 'had (therefore) to rely entirely on what was stated in their statement of defence'. And in *Gissco Sdn Bhd v Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397, where again there was no affidavit in reply to resist the application for summary judgment, Tan Chiaw Thong J nonetheless considered the defence.

[5] It would be fair to say that the defence of the respondents was a denial of liability coupled with a requirement of proof from the appellant of its alleged loss. But before us, it was not disputed by the respondents that the respondents were indeed professionally negligent as claimed. However, learned counsel for the respondents argued that the claim was founded on negligence and that the claim was therefore for unliquidated damages which ought to be assessed. Learned counsel cited the case of *Adzmi bin Ali v Mohd Isa bin Kasad* [1987] 2 MLJ 199 to push the case for an assessment of damages. But alas, it was not appreciated that *Adzmi bin Ali* concerned a claim for damages arising from personal injuries. The present claim was for a liquidated sum, for it was for a specific sum of money, the amount of which was ascertained or capable of being ascertained by a mere calculation (see *Re Ahearn; Ex parte Palmer* (1906) 6 SR (NSW) 576) by the parties or the court (see *Mohanlal v Rameshwar Dayal And Ors* AIR 1976 Raj 4). Unarguably, the claim was not for an unliquidated sum.

[6] The learned judge did not perceive the claim as one for unliquidated damages. However, in relation to proof of the loss of the appellant, the learned judge held (see 134AR) that the claim was not fully particularised in the affidavit in support of the application for summary judgment — 'affidavit sokongan tersebut tidak memberi butir-butir terperinci secara spesifik bagaimana tuntutan plaintiff RM899,190.13 diperolehi'. But with respect to the learned judge, we fail to see how it could be held that the claim was not fully particularised, when the learned judge was able, to the contrary, to reproduce the particulars of the claim for RM899,190.13 in his grounds of judgment (see 133AR) from the particulars stated by the appellant at para 19 of the affidavit in support at 200AR, which particulars were, in our opinion, clearly more than sufficient particulars of the claim for the said RM899,190.13.

[7] In relation to the claim of RM26,202.55 that the appellant paid to ODA Holdings as legal costs and for the refund of RM13,691.70 that the appellant paid to the respondents as professional fees, the learned judge held that there

was no evidence that those legal costs and or professional fees had been paid (see 134AR). But again with respect to the learned judge, we fail to see how we could support that finding, for contrary to the finding of the learned judge the appellant had clearly affirmed that legal costs were paid to ODA Holdings (see para 29 of the affidavit in support at 207AR) and that professional fees were paid to the respondents (see para 32(iv) of the affidavit in support at 218AR).

[8] Suffice it to say that that we find all reasons of the learned judge to order assessment of damages could not be sustained. The quantum of loss of the appellant was known and proved, by the judgment against ODA Holdings, by the quantum stated in the s 218 notices and by the unchallenged averments in the affidavit in support. We absolutely see no case for damages to be assessed.

[9] For those reasons, we unanimously (a) allow this appeal with costs in the sum of RM10,000 to the appellant who would be entitled to a refund of the deposit, (b) set aside the order of assessment of damages, and (c) affirm the summary judgment as ordered by the learned senior assistant registrar.

Appeal allowed with costs, order of damages assessment set aside and summary judgment affirmed.

Reported by Afiq Mohamad Noor